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## The Public Trust Doctrine Adrift in Federal Waters: Fishery Management in the Exclusive Economic Zone off Alaska

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### Cover Page Footnote

I would like to thank Professor Michael C. Blumm and my colleagues in the Public Trust Seminar course that inspired this article, as well as acknowledge the casebook that helped inform my understanding of the public trust doctrine: Michael C. Blumm & Mary Christina Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law* (2013). I would also like to thank the student membership of the Seattle Journal of Environmental Law for their thoughtful comments and hard work.

## The Public Trust Doctrine Adrift in Federal Waters: Fishery Management in the Exclusive Economic Zone off Alaska

Joshua B. Fortenbery<sup>†</sup>

*The public trust doctrine's concern for posterity necessitates an ecosystem-based approach to fisheries management to ensure that marine resources are left unimpaired for future generations. In Alaska, managing fisheries according to trust principles is a constitutional obligation, and in order to prevent the inconsistent management of migratory species, the same trust principles must be applied in the federal waters of the Exclusive Economic Zone (EEZ) off Alaska, where fully half of the commercial fishing in the entire United States takes place. The Magnuson-Stevens Fishery Conservation and Management Act (MSA) currently governs fishing in the EEZ, and provides two means of incorporating the public trust doctrine into EEZ fishery management: (1) through the statute's national standards, implemented by regional councils, which create trust duties requiring that fisheries remain viable year after year, and (2) through the delegation or deferral of management authority to states with strong public trust doctrines. The National Marine Fisheries Service (NMFS) has delegated or deferred management authority over several EEZ fisheries to the State of Alaska; those fisheries are currently being managed according to Alaska state law, even though they are located in federal waters. NMFS has indicated that objectives of the MSA are not inconsistent with Alaska's state management strategy—including its constitutional public trust obligations. The public trust doctrine provides fishery managers with a means of expanding the scope of conservation strategies within the framework of existing regulations, and allows*

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<sup>†</sup> Editor in Chief, Environmental Law, Lewis & Clark Law School; J.D. expected 2016. I would like to thank Professor Michael C. Blumm and my colleagues in the Public Trust Seminar course that inspired this article, as well as acknowledge the casebook that helped inform my understanding of the public trust doctrine: Michael C. Blumm & Mary Christina Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law* (2013). I would also like to thank the student membership of the Seattle Journal of Environmental Law for their thoughtful comments and hard work.

*environmental plaintiffs to challenge commercial fishing activity that violates trust obligations by failing to protect the long-term health of both fisheries and marine ecosystems. All that is left is for the relevant actors in fisheries management to seize and apply the doctrine.*

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#### I. INTRODUCTION

Although some resources in the United States are incontrovertibly impressed with inherent public access rights, the public trust doctrine that supports these usufructuary rights has uncertain contours.<sup>1</sup> The public trust doctrine essentially maintains that certain natural resources constitute the corpus of a trust, which the state must manage for the benefit of both present and future generations.<sup>2</sup> The doctrine traditionally focused on protecting public access to navigable waters for the purposes of fishing and commerce,<sup>3</sup> but it has evolved into a flexible theory of resource

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1. See, e.g., Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 230-31 (1980) (explaining how "public rights in and over the beds of navigable waters and tidelands are firmly established," but that beyond these areas the public has uncertain rights).

2. DAVID C. SLADE, *PUTTING THE PUBLIC TRUST TO WORK* 3 (1997).

3. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 431-32 (1989).

management, particularly over the last forty years.<sup>4</sup> States have employed the public trust doctrine to assert public access rights to beaches,<sup>5</sup> to impose use restrictions on water rights presumed to be vested,<sup>6</sup> and to implement wildlife management regimes.<sup>7</sup> There is no unified public trust doctrine, however; each state administers the public trust according to its own legal traditions.<sup>8</sup>

Alaska has a particularly robust public trust doctrine, which derives much of its authority from the “common use” clause of the Alaska Constitution.<sup>9</sup> The Alaska Supreme Court has explained that the “common law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife, and water resources of the state for the benefit of all the people.”<sup>10</sup> The framers of the Alaska Constitution were likely influenced by the U.S. Supreme Court,<sup>11</sup> which had previously ruled that states exercise their power over wildlife “as a trust for the benefit of the people.”<sup>12</sup> In Alaska, responsibility for managing natural resources according to trust principles includes an obligation for the state to treat fisheries as a public resource.<sup>13</sup>

Although the Alaskan public trust doctrine ostensibly guarantees the sustainable management of living resources within state waters, just three

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4. See Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 *ECOLOGY L.Q.* 351 (1998) (attributing the expansion of the doctrine into other areas of natural resource management to an article written by Professor Joseph Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 *MICH L. REV.* 471 (1970)).

5. See *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (N.J. 1894) (“the public must be given access to and use of privately-owned dry sand areas as reasonably necessary”).

6. See *Nat’l Audubon Soc’y v. Superior Court*, 33 Cal. 3d 419, 452 (1983) (holding that no party can obtain a vested right to harm the public trust, and that trust principles must be considered in water allocation decisions).

7. *Barrett v. State*, 116 N.E. 99, 102 (N.Y. 1917) (“In liberating these beaver the state was acting as a government. As a trustee for the people . . . it was doing what it thought best for the interests of the public at large”).

8. SLADE, *supra* note 2, at 3.

9. ALASKA CONST. art. VIII, § 3 (“Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”); See also Gregory F. Cook, *The Public Trust Doctrine in Alaska*, 8 *J. ENVTL. L. & LITIG.* 1, 21 (1993) (“In Alaska, the scope of the resources covered by the umbrella of the public trust doctrine is far broader than in most other states”).

10. *Owsichuk v. Alaska*, 763 P.2d 488, 495 (Alaska 1988).

11. *Id.* (“The framers of the common use clause probably relied heavily on *Geer* [161 U.S. 519].”).

12. *Geer v. Connecticut*, 161 U.S. 519, 530 (1896).

13. See *Gilbert v. State, Dep’t of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 398-99 (Alaska 1990). (“The state has an obligation to manage fish and game resources to the benefit of all in accord with its public trust duties”); *Metlakatla Indian Cmty., Annette Island Reserve v. Egan*, 362 P.2d 901, 915 (Alaska 1961) (subsequent history omitted) (“These migrating schools of fish, while in inland waters, are the property of the state, held in trust for the benefit of all the people of the state, and the obligation and authority to equitably and wisely regulate the harvest is that of the state”).

miles offshore, in the exclusive economic zone (EEZ), it remains unclear whether there is any baseline protection of fishery resources.<sup>14</sup> Because half of all commercial fishing in the United States takes place in the EEZ off Alaska,<sup>15</sup> these federally managed fisheries have the potential to greatly affect the health of migratory species in Alaskan waters. The Magnuson-Stevens Fishery Conservation and Management Act (MSA) currently governs fishing in the EEZ,<sup>16</sup> and delegates authority for managing the waters off the Alaskan coast to the North Pacific Fishery Management Council (NPFMC), one of eight regional fishery management councils.<sup>17</sup> If there is no corollary to the public trust doctrine in the EEZ, the NPFMC presumably would be free to set fishery management policy without considering potential harm to future generations, thereby undermining Alaskan public trust principles and the state's fiduciary obligations.

It is possible that the management of natural resources as trustee for the public is an inherent attribute of sovereignty, as one commentator argues.<sup>18</sup> If that is true, then public trust principles would necessarily constrain any federal actions in the EEZ, as the U.S. is the only sovereign entity with jurisdiction over the fishery resources in those waters.<sup>19</sup> This argument poses an interesting theoretical question, but overlooks two crucial ways in which the public trust doctrine is already relevant to fishery management in the EEZ. First, Congress incorporated public trust duties into the MSA's national standards,<sup>20</sup> and fishery management councils must consider these trust obligations in formulating all fishery

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14. Mary Turnipseed et al., *The Silver Anniversary of the United States' Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of A Blue Water Public Trust Doctrine*, 36 *ECOLOGY L.Q.* 1, 8 (2009). Although the EEZ technically begins 12 miles offshore, under U.S. fisheries laws, the EEZ is defined as the waters between three and two hundred nautical miles from the coast., *What is the EEZ?*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://oceanservice.noaa.gov/facts/eez.html> (last visited Feb. 26, 2015).

15. Molly Dischner, *NOAA: Alaska Fish Worth \$1.7B in 2012*, *ALASKA JOURNAL OF COMMERCE* (May 8, 2014), <http://www.alaskajournal.com/Alaska-Journal-of-Commerce/May-Issue-2-2014/NOAA-Alaska-fish-worth-17B-in-2012/>.

16. Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1883 (2012).

17. 16 U.S.C. § 1852(a)(1)(G) (2012).

18. See Casey Jarman, *The Public Trust in the Exclusive Economic Zone*, 65 *OR. L. REV.* 1, 2 (1986) (arguing that the claim of sovereignty over the EEZ necessarily extended the public trust doctrine to federal resource management in those waters).

19. *Id.* at 1–2.

20. See, e.g., 16 U.S.C. § 1851(a)(1) (National Standard 1 requires fisheries to achieve optimum yield “on a continuing basis,” consistent with the public trust doctrine’s goal of preserving resources for future generations).

management plans.<sup>21</sup> Second, fishery management councils can delegate or defer management authority to the states under certain conditions,<sup>22</sup> and if a state has a strong public trust doctrine applicable to fishing, that state's trust duties will be extended to any EEZ fisheries under its jurisdiction.<sup>23</sup>

For example, the NPFMC has deferred much of its authority to regulate salmon fishing in federal waters to the State of Alaska, and state regulations govern commercial salmon fishing in designated portions of the EEZ with no federal oversight.<sup>24</sup> State management of these salmon fisheries raises interesting questions of federalism because Alaska state law—rather than the MSA—now applies in parts of the EEZ, even though the federal government has claimed exclusive sovereign authority over the entire EEZ. If there are no public trust duties impressed upon the portions of the EEZ managed by Alaska, this management scheme would create inconsistent obligations for the state, as it would have to consider trust principles within state waters, then abandon those considerations with respect to the exact same species of fish in federal waters. Such a result would be untenable, and contrary to the NPFMC's stated goal of managing "salmon stocks seamlessly throughout their range."<sup>25</sup> Therefore, it is likely that Alaska manages salmon fishing in the EEZ according to its long-standing role as trustee over the living resources under its jurisdiction. If Alaska is already applying trust principles in an EEZ fishery, arguably the objectives of the MSA are at least consistent with the public trust doctrine. However, the public trust doctrine requires protection of the entire marine ecosystem,<sup>26</sup> while the MSA is mostly concerned with sustaining viable populations of commercially valuable species.<sup>27</sup> The public trust doctrine thus encourages stricter fishery management than the MSA, ensuring that future generations will have unimpaired access not only to fisheries, but to all ocean resources potentially affected by fishing.

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21. *Id.* at § 1851 ("Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management").

22. *Id.* at § 1856 (describing state jurisdiction under the MSA).

23. *Id.* § 1856(a)(3) (describing when state laws and regulations apply in the EEZ, extending applicable state public trust doctrines into federal waters).

24. NPFMC, FISHERY MANAGEMENT PLAN FOR THE SALMON FISHERIES IN THE EEZ OFF ALASKA 16 (2012) ("[S]tate regulations apply to all fishing vessels participating in these fisheries . . .") [hereinafter Salmon FMP].

25. *Id.* at 12.

26. See Ralph W. Johnson, *Oil and the Public Trust Doctrine in Washington*, 14 U. PUGET SOUND L. REV. 671, 678 n. 50 (1991) ("the right of fishery necessarily includes an implied right to water quality sufficient to support the fishery.").

27. See 16 U.S.C. 1801(b) (detailing the purposes of the MSA, which only discuss conservation in the context of commercial and recreational fisheries).

As stated above,<sup>28</sup> the MSA provides two means of incorporating the public trust doctrine into EEZ fishery management: (1) through national standards applicable to all management decisions,<sup>29</sup> and (2) through the delegation of management authority to states with strong public trust doctrines.<sup>30</sup> Accordingly, fishery management councils should be more willing to consider public trust principles in formulating fishery management plans, injecting long-term environmental considerations into fishery management decisions currently dominated by the immediate interests of the commercial fishing industry.<sup>31</sup> Environmental plaintiffs should also be prepared to challenge fishery management decisions that violate the public trust doctrine, rather than relying exclusively on the Administrative Procedure Act (APA) to bring suit.<sup>32</sup> Although the MSA prescribes the standard of judicial review for challenges to regulations made under the Act,<sup>33</sup> the MSA does not preempt the public trust doctrine, as several courts have found that the doctrine is not displaced by legislation, but rather supplements statutes governing resource use.<sup>34</sup> The public trust doctrine thus provides fishery managers with a means of expanding the scope of conservation strategies within the framework of existing regulations and allows environmental plaintiffs to challenge

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28. See *supra* notes 20–22.

29. 16 U.S.C. § 1851.

30. *Id.* at § 1856.

31. See, e.g., Peter Van Tuyn, *Courage Without Conviction: Cause for Chaos in U.S. Marine Fisheries Management*, 28 VT. L. REV. 663, 666 (2004) (arguing that management measures without economic benefits are given little attention because “industry-dominated ‘regional fishery management councils’ are empowered to craft regulations for their own industry”).

32. Section 706 of the Administrative Procedure Act provides that a “reviewing court shall compel agency action unlawfully withheld or unreasonably delayed,” and “hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right; (C) in excess of statutory jurisdiction; (D) without observance of procedure required by law; (E) unsupported by substantial evidence;” or “(F) unwarranted by the facts.” 5 U.S.C. § 706(2) (2012). Under the MSA, a “court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of such Title.” 16 U.S.C. § 1855(f)(1)(B) (2012). Invoking the public trust doctrine would provide plaintiffs with a more flexible means of challenging agency action, as complaints would not be limited to whether agency interpretations of the MSA are reasonable and the agency would not be given so much deference. Turnipseed et al., *supra* note 14, at 58.

33. 16 U.S.C. § 1855(f)(1)(B).

34. See, e.g., *Sierra Club v. Dep’t of Interior*, 398 F. Supp. 284, 287 (N.D. Cal. 1975) (finding the National Park Service Organic Act to impose affirmative public trust duties beyond the plain language of the statute); *Nat’l Audubon Soc’y v. Superior Court*, 33 Cal. 3d 419, 445 (1988) (holding that the public trust doctrine must be considered in conjunction with the statutory appropriative water rights system); *In re Water Use Permit Applications*, 9 P.3d 409, 445 (Haw. 2000) (“The Code and its implementing agency, the Commission, do not override the public trust doctrine or render it superfluous.”).



commercial fishing activity that violates trust obligations by failing to protect the long-term health of both fisheries and marine ecosystems.

This article maintains that any assertion of sovereignty over migratory fish in the EEZ off Alaska is necessarily limited by the public trust doctrine, as unfettered management of those resources would undermine the Alaskan public trust doctrine and threaten depletion of the trust corpus. Part II explores the nature of Alaska's public trust doctrine. Part III considers whether there is a common law federal public trust doctrine applicable to EEZ fisheries. Part IV analyzes the statutory management scheme of the MSA and the public trust principles that Congress imputed into the MSA's national standards. Part V discusses the delegation of authority to states under the MSA, and asserts that the objectives of the MSA must be consistent with Alaska's public trust doctrine because the state is applying its trust principles to the management of several fisheries in the EEZ off Alaska. The article concludes that the NPFMC and environmental plaintiffs should be willing to use the public trust doctrine as a means of encouraging fishery management practices that will benefit both present and future generations, as required by the public trust doctrine and the Alaska Constitution.

## II. OVERVIEW OF THE ALASKA PUBLIC TRUST DOCTRINE

Many scholars have already traced the international and domestic origins of the public trust doctrine, so this article will not attempt a redundant history lesson.<sup>35</sup> The Alaskan public trust doctrine, although distinct from that of other states, contains many principles that were imported from other jurisdictions.<sup>36</sup> Even so, Alaska's public trust doctrine reflects a unique set of concerns. Alaska is a vast territory with an immense amount of valuable natural resources, and the state's constitution contains several provisions aimed at protecting those resources, entrenching the Alaskan public trust doctrine as foundational law.<sup>37</sup>

Perhaps the most important public trust provision in the Alaska Constitution is the "common use clause," providing that "wherever occurring in their natural state, fish, wildlife, and waters are reserved to

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35. See, e.g., Wilkinson, *supra* note 3 (explaining the international origins of the public trust doctrine and its establishment in the U.S.); Sax, *supra* note 4, at 475–76 (describing the influence of Roman and English law on the public trust doctrine in the U.S.).

36. See *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1118 (Alaska 1988) (adopting the "approach employed by [Alaska's] sister states" in attaching trust obligations to state conveyances of tidelands).

37. Cook, *supra* note 9, at 5.

the people for common use.”<sup>38</sup> Although the common use clause does not explicitly mention the public trust doctrine, the Alaska Supreme Court has explained that this provision constitutionalized “common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters.”<sup>39</sup> In the context of managing living resources, this duty is both a “prohibition against any monopolistic grants or special privileges”<sup>40</sup> and, with reference to fish, an obligation to “equitably and wisely” regulate harvests.<sup>41</sup> Importantly, private citizens can invoke the Alaskan public trust doctrine to challenge state regulations, and the Alaska Supreme Court has stated that it will subject any regulations granting exclusive privileges over resources listed in the common use clause to close scrutiny.<sup>42</sup>

The Alaska Supreme Court’s interpretations of the Alaskan public trust doctrine reflect the doctrine’s emphasis on equal access to resources, and in fact, the state adopted the “common use” provisions of its constitution mostly as an anti-monopoly measure.<sup>43</sup> However, guaranteeing equitable harvesting rights is not the only obligation of the state. The doctrine also requires state officials to prevent depletion of the trust corpus by providing for the conservation of fish and game resources.<sup>44</sup> Obviously, guaranteeing equal access to a resource that the public could exploit into oblivion would be a meaningless exercise, and it is this additional duty to provide for the conservation of living resources that is most relevant in the fisheries context. The state’s obligation to conserve fishery resources is reinforced by the “no exclusive right of fishery” clause of the Alaska Constitution.<sup>45</sup> Originally, this clause only

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38. ALASKA CONST., art. VIII, § 3.

39. *Owsichuk v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 493 (Alaska 1988).

40. *Id.* at 496.

41. *Metlakatla Indian Cmty., Annette Island Reserve v. Egan*, 362 P.2d 901, 915 (Alaska 1961) (subsequent history omitted).

42. *Owsichuk*, 763 P.2d at 494 (“grants of exclusive rights to harvest natural resources listed in the common use clause should be subjected to close scrutiny.”).

43. *Id.* at 493 (“We begin by examining constitutional history to determine the framers’ intent in enacting the common use clause . . . Its purpose was anti-monopoly. This purpose was achieved by constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters.”).

44. *Herscher v. State, Dep’t of Commerce*, 568 P.2d 996, 1005 (Alaska 1977) (“fish and game resources are permitted to be harvested, but at the same time must be conserved to avoid depletion and extinction”).

45. ALASKA CONST. art. VIII, § 15 (“No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State”).

required the state to equitably allocate fishing privileges, but the constitution was later amended to clarify that the state can “limit entry into any fishery for purposes of resource conservation.”<sup>46</sup> Essentially, the “no exclusive right of fishery” clause delineates the state’s fishery management objectives—although Alaska cannot grant any fishing vessel exclusive harvest rights, the state can restrict access to fisheries if necessary to ensure their continued vitality, consistent with its duties as trustee over fishery resources.<sup>47</sup> Because trust principles are fundamental to Alaska’s fishery management decisions, state participation in the management of federal fisheries must involve the same considerations described above.<sup>48</sup> The next section considers whether there is a common law federal public trust doctrine in the EEZ analogous to that of Alaska.

### III. A COMMON LAW FEDERAL PUBLIC TRUST DOCTRINE IN THE EEZ

President Ronald Reagan declared U.S. sovereignty over the world’s largest EEZ in a 1983 presidential proclamation,<sup>49</sup> and arguments that this assertion of sovereignty created public trust duties in the EEZ followed shortly thereafter.<sup>50</sup> One scholar argued that “the EEZ notion of sovereign rights brings with it . . . an increased role of public or common stewardship.”<sup>51</sup> Despite many persuasive arguments regarding why the public trust doctrine should apply in the EEZ, commentators still have not reached any consensus as to whether the doctrine does apply to ocean resources.<sup>52</sup> If a public trust already exists in the EEZ, a private plaintiff

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46. Stephen M. White, “Equal Access” to Alaska’s Fish and Wildlife, 11 ALASKA L. REV. 277, 285 (1994) (ALASKA CONST. art. VIII, § 15).

47. *Id.*; The Alaska Constitution’s “sustained yield” clause stresses that the state’s fisheries are to be sustainably managed, and describes fish as a “replenishable” resource. ALASKA CONST., art. VIII, § 4.

48. Part V examines the implications of Alaska managing federal fisheries according to the state’s trust principles.

49. Proclamation No. 5030, Exclusive Economic Zone of the United States of America, 48 Fed. Reg. 10605, codified at 3 C.F.R. § 5030 (Mar. 10, 1985).

50. See Jarman, *supra* note 18, at 1–2 (arguing that trust principles should apply to the EEZ just three years after the declaration of sovereignty over those waters).

51. Biliana Cicin-Sain & Robert W. Knecht, *The Problem of Governance of U.S. Ocean Resources and the New Exclusive Economic Zone*, 15 OCEAN DEV. & INT’L L. 289, 307 (1985).

52. See, e.g., Turnipseed et al., *supra* note 14, at 25 (recent article discussing the “unresolved possibility of a public trust doctrine for federal ocean waters”); Kevin J. Lynch, *Application of the Public Trust Doctrine to Modern Fishery Management Regimes*, 15 N.Y.U. ENVTL. L.J. 285, 288 (2007) (“it is not clear that the [public trust] doctrine would apply as a matter of law to many federally-controlled marine fisheries”). It is possible that the continued ambiguity in the scholarship is due to a focus on whether public trust principles and the historical foundations of the public trust doctrine are theoretically consistent with sovereign management of ocean resources. See, e.g., DONALD C. BAUR ET AL., OCEAN AND COASTAL LAW AND POLICY 58 (2008) (“Looking back to its origins, there are sound reasons for applying the Public Trust Doctrine in the federal EEZ”).

could invoke the public trust doctrine to challenge federal fishery management decisions that fail to protect the fishing rights of future generations.<sup>53</sup> In addition, fishery management councils currently tend to focus on conserving species that have commercial value—when councils prioritize conservation at all—because industry representatives dominate the council system.<sup>54</sup> A public trust doctrine generally applicable to the EEZ would require fishery managers to consider the effects of fishing on the marine ecosystem as a whole, authorizing environmental claims alleging damage to trust resources without necessarily tying those claims to the objectives of the MSA.

Regardless of whether EEZ fisheries are similar to other resources subject to the public trust doctrine, any claim that the federal government is burdened by trust responsibilities in the EEZ must find support in federal law to make that burden enforceable. This section considers evidence that the public trust doctrine applies to the federal government as a matter of common law. Part IV proceeds to argue that the MSA imposes statutory trust duties on fishery management in the EEZ.

There are at least two federal district court decisions that directly bear on the issue of federal public trust obligations. In *U.S. v. 1.58 Acres of Land*, the federal district court for the District of Massachusetts considered whether the federal condemnation of a state's submerged lands destroyed the public trust impressed on that property.<sup>55</sup> Adopting a theory of co-trusteeship, the court held that the public trust at issue was administered jointly by the state and federal governments, such that "neither sovereign may alienate [the] land free and clear of the public trust."<sup>56</sup> One scholar has asserted that the federal government assumes this role of co-trustee any time there is a national interest in a resource under state jurisdiction, and that co-trustee obligations are an inherent attribute of the U.S. federalist system, with its "layered sovereign interests in natural

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53. See *Sierra Club v. Dep't of Interior*, 398 F. Supp. 284 (N.D. Cal. 1975) (attributing a public trust doctrine to the administration of the national parks for the first time in the context of litigation).

54. See, e.g., Van Tuyn, *supra* note 31, at 666 ("North Pacific fishery managers . . . have rejected habitat protections where the benefit of doing so cannot be expressed in direct economic terms; and they have done this despite the ever-increasing body of scientific information detailing the long-term destructive nature of trawling on marine habitats."). If fishery managers considered their role to be that of a trustee over living resources, rather than mere facilitators of commercial fishing, perhaps with encouragement from environmental plaintiffs, it might be possible to shift the focus from the economic costs of habitat protection to the conservation benefits of habitat protection.

55. *U.S. v. 1.58 Acres of Land*, 523 F. Supp. 120 (D. Mass. 1981).

56. *Id.* at 124.

resources.”<sup>57</sup> This argument is based on the property law concept of co-tenancy, which posits that co-tenant fiduciary duties are created whenever two entities are equally entitled to common property.<sup>58</sup> The concept of co-tenancy has less certain application in the context of the EEZ, however, as even though coastal states and the federal government might have a common interest in migratory fish, only the federal government has claimed sovereign rights over EEZ fisheries.<sup>59</sup> Thus, the resources in those fisheries are not obviously a common asset.

An alternative to co-trusteeship is the possibility that the federal government has an independent obligation to protect wildlife resources for the benefit of the U.S. public, separate from any co-tenant duty to protect a state’s trust property. After a transportation company allegedly destroyed thirty thousand waterfowl as a result of an oil spill, the federal district court for the Eastern District of Virginia stated that the federal government’s right to seek damages did not depend on ownership of the migratory birds.<sup>60</sup> Instead, in *In re Steuart Transp. Co.*, the court held that “[u]nder the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public’s interest in natural wildlife resources,” and therefore the public trust doctrine supported the U.S. claim for damages.<sup>61</sup> This language seemingly provides strong support for the premise that the federal government has a trust duty to manage living resources for the benefit of the public.

Cutting against the strength of the *Steuart* holding, however, is dicta asserting that “no individual citizen could seek recovery for the waterfowl.”<sup>62</sup> This statement may indicate that an environmental plaintiff would not be able to sue a third party for damaging federal trust property. Although the court stated that the U.S. has an obligation to “protect and preserve” natural resources, damage or threatened damage to those resources apparently only creates a right of action in the federal government against third parties.<sup>63</sup> Such a construction of the public trust doctrine might not allow private citizens or state governments to hold the

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57. Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for A Paradigm Shift*, 39 ENVTL. L. 43, 85 (2009).

58. *Id.* at 86.

59. 16 U.S.C. § 1801(b)(1) (2012) (The U.S. will exercise “sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish, within the exclusive economic zone established by Presidential Proclamation 5030”).

60. *In re Steuart Transp. Co.*, 495 F. Supp. 38, 39 (E.D. Va. 1980).

61. *Id.* at 40.

62. *Id.*

63. *Id.*

U.S. accountable as a trustee for any damage to the trust corpus. The *Steuart* court invoked the doctrine only to permit the U.S. to pursue damages; it did not indicate whether the “right and duty” to protect wildlife involved an affirmative obligation enforceable against the federal government.<sup>64</sup> If not, the federal public trust doctrine would exist only to the extent that the U.S. government chooses to apply it in its prosecutorial discretion. Thus, even if this public trust duty applies to the fishery resources in the EEZ, it still might not serve as a check on unwise federal management because it would be unavailable to private plaintiffs. In all, the instances in which courts have recognized federal public trust duties lend uncertain support to the notion of a workable public trust doctrine for EEZ fisheries. Therefore, if there are any enforceable federal trust obligations in the EEZ, those obligations must have legislative origins. The next section examines whether Congress imputed public trust duties into the MSA.

#### IV. FISHERY MANAGEMENT UNDER THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT

Although the public trust doctrine’s origins largely lie in the common law,<sup>65</sup> legislatures have also enacted laws reflecting trust principles,<sup>66</sup> and many modern courts have recognized congressional intent to incorporate the public trust doctrine into various statutes.<sup>67</sup> Thus, even though EEZ fisheries are already highly regulated under the MSA,<sup>68</sup> the existence of a statutory management regime in the EEZ does not foreclose the application of the public trust doctrine in those federal waters, as courts have long recognized that the public trust doctrine complements, rather

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64. *See id.*

65. *See* Turnipseed et al., *supra* note 14, at 47 (“The public trust doctrine has customarily been a matter of common law.”).

66. *See* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 720 (2006) (asserting that the “National Environmental Policy Act, the Clean Water Act, and the Endangered Species Act, are based on public trust principles in the sense that they set out a policy of protecting and preserving the environment for its own sake and for future generations.”).

67. *See, e.g.,* Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978, 986 (9th Cir. 2002) (stating that the public trust doctrine is reflected in Washington’s Shoreline Management Act); *Sierra Club v. Dep’t of Interior*, 398 F. Supp. 284, 287 (N.D. Cal. 1975) (finding the National Park Service Organic Act to impose trust duties on the Secretary of the Interior); *See also* Klass, *supra* note 66, at 734 (“courts are relying on the common law doctrine but infusing it with policies and standards contained in more contemporary environmental legislation or state constitutional provisions”).

68. *See* 16 U.S.C. § 1811 (2012) (asserting exclusive fishery management authority over the EEZ).

than supplants, statutes governing resource use.<sup>69</sup> This section first discusses the structure and administration of the MSA, then examines the statute for evidence of affirmative public trust obligations.

### A. *The Basic Structure of the MSA*

Congress enacted the MSA to “conserve and manage the fishery resources found off the coasts of the United States . . . by exercising sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish, within the exclusive economic zone.”<sup>70</sup> The statute essentially divided the EEZ into discrete geographic regions and assigned management authority to eight regional fishery management councils.<sup>71</sup> Fishery management councils, largely comprised of state officials and industry representatives, must prepare a fishery management plan “for each fishery under its authority that requires conservation and management.”<sup>72</sup> The councils have a considerable amount of discretion in formulating a fishery management plan (FMP), so long as it is consistent with the provisions of the MSA, including the ten “national standards.”<sup>73</sup> These standards reflect the basic policy objectives of the statute, such as achieving the “optimum yield” of each fishery on a continuing basis, avoiding discrimination between residents of different states, and considering the importance of fishery resources to fishing communities in order to provide for their sustained participation in a fishery.<sup>74</sup> The FMPs developed by the regional councils, rather than the MSA itself, govern the specific management measures of each fishery, so in order to maintain federal oversight the National Marine Fisheries Service (NMFS) reviews each FMP for consistency with federal law.<sup>75</sup> The MSA thus creates a national program of conservation and management, while promoting region-specific management measures.<sup>76</sup>

Despite an equal emphasis on both fishing and conservation from the MSA’s enactment in 1976, overfishing has been a constant problem,<sup>77</sup> and

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69. See, e.g., *In re Water Use Permit Applications*, 9 P.3d 409, 445 (Haw. 2000) (“The Code and its implementing agency, the Commission, do not override the public trust doctrine or render it superfluous.”); *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709, 726-727 (1988) (rejecting the assertion that the California appropriative water rights system subsumed the public trust doctrine).

70. 16 U.S.C. § 1801(b)(1) (2012).

71. *Id.* § 1852(a)(1).

72. *Id.* § 1852(h)(1).

73. *Id.* § 1851.

74. *Id.*

75. Eric Schwaab, *The Magnuson Act Thirty-Five Years Later*, 17 ROGER WILLIAMS U. L. REV. 14, 15 (2012).

76. *Id.*

77. See Van Tuyn, *supra* note 31, at 663.

multiple amendments to the statute have addressed the failure to achieve sustainable fisheries.<sup>78</sup> The most recent changes to the MSA, adopted in 2007, required the regional management councils to set annual catch limits and included accountability measures designed to eliminate overfishing.<sup>79</sup> Although one National Oceanic and Atmospheric Administration (NOAA) administrator described the amendments as “groundbreaking” and expressed optimism about the prospects for successfully ending overfishing,<sup>80</sup> others are more skeptical.<sup>81</sup> This skepticism seems to be based on an impression that the fragmented, regional, and regulatory nature of ocean governance is inherently unworkable and has prevented any meaningful progress in conserving ocean resources.<sup>82</sup>

Although a unified marine conservation strategy divorced from the MSA might be useful, the argument that conservation goals cannot otherwise be achieved ignores the benefits of fragmented management for certain EEZ fisheries. For example, fishery managers in New England refused to limit entry into the fisheries under their jurisdiction or set hard catch limits for years, decisions that arguably led to the collapse of the region’s fisheries.<sup>83</sup> In contrast, fisheries in the North Pacific have remained relatively healthy, in part due to a fragmented management approach that allowed the Alaska region to set strict catch limits, while New England was encouraging unlimited participation.<sup>84</sup> Had the New England fishery managers dominated national policy, in all likelihood every U.S. fishery would currently be on the brink of collapse, so it is important to remember that a unified management regime could be as harmful as it could be beneficial, depending on who is in charge. Further, as described below, fishery management councils can delegate management authority to the states under certain circumstances,<sup>85</sup> and this delegation of authority can result in fishery management that emphasizes conservation and sustainability beyond the requirements of the MSA,

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78. See Turnipseed et al., *supra* note 14, at 54-55.

79. Shaun M. Gehan & Michele Hallowell, *Battle to Determine the Meaning of the Magnuson-Stevens Fisheries Conservation and Management Reauthorization Act of 2006: A Survey of Recent Judicial Decisions*, 18 OCEAN & COASTAL L.J. 1, 7 (2012).

80. Schwaab, *supra* note 75, at 17.

81. Turnipseed et al., *supra* note 14, at 55 (“While this act provides a stronger mandate to manage fisheries sustainably than the previous Sustainable Fisheries Act, not enough time has passed to judge its effectiveness”).

82. *Id.* at 7.

83. PEW CHARITABLE TRUSTS AND OCEAN CONSERVANCY, *THE LAW THAT’S SAVING AMERICAN FISHERIES: THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT* 10 (2013).

84. *Id.*

85. See *infra* Part V.A.



particularly when an authorized state like Alaska has public trust duties in fishery management decisions.<sup>86</sup>

*B. Statutory Evidence of a Public Trust in the EEZ*

One scholar has argued that the MSA did not go far enough in incorporating public trust principles.<sup>87</sup> By failing to impose a clear public trust burden on fisheries management, this commentator claimed that Congress “short-circuited the ability of courts to participate in ensuring U.S. fisheries management was sustainable.”<sup>88</sup> While it is true that there is no explicit reference to the public trust doctrine in the MSA, it does not necessarily follow that the statute imposes no trust obligations. In fact, national standards 1, 4, and 8 all reflect public trust concerns. National standards 1 and 8 of the MSA both include an obligation to protect the usufructuary rights of future generations, an important public trust principle.<sup>89</sup> Consistent with this purpose, courts have ruled that “the Service must give priority to conservation measures” when making management decisions under the MSA,<sup>90</sup> as the statute contemplates that commercial fishing will be a viable industry year after year.<sup>91</sup> In addition, national standard 4 emphasizes non-discrimination in the allocation of fishing privileges, a reflection of the public trust doctrine’s historical emphasis on equal access to resources.<sup>92</sup> Although neither the national standards nor the courts’ prioritization of conservation measures provide any explicit reference to the public trust doctrine, it is clear that the implementing agency does not have unfettered management discretion.

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86. See *infra* Part V.B.

87. Turnipseed et al., *supra* note 14, at 56.

88. *Id.*

89. See 16 U.S.C. § 1851(a)(1) (2012) (“Conservation and management measures shall prevent overfishing while achieving, *on a continuing basis*, the optimum yield from each fishery for the United States fishing industry”) (emphasis added); 16 U.S.C.A. § 1851(a)(8) (2012) (“Conservation and management measures shall . . . take into account the importance of fishery resources to fishing communities . . . in order to . . . provide for the sustained participation of such communities”).

90. *Natural Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000) (holding that fishery quotas which did not have at least a 50% chance of meeting the MSA’s conservation goals were unreasonable).

91. 16 U.S.C. § 1851(a)(1) (2012).

92. *Id.* § 1851(a)(4) (National standard 4 provides that “[c]onservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.”); See also *Lynch*, *supra* note 46, at 297 (“[National standard 4] is consistent with the decisions of state courts under the public trust doctrine that allow municipalities to charge reasonable fees for the use of their beaches, but do not allow them to “discriminate in any respect between their residents and nonresidents.”).

Instead, fishery managers are supposed to achieve optimum yield in each fishery “on a continuing basis,”<sup>93</sup> rather than annually, and management measures must provide for the “sustained participation” of fishing communities.<sup>94</sup>

The MSA is not the only federal statute that contains public trust principles. For example, the National Park Service Organic Act of 1916 contains language that suggests the imposition of trust duties.<sup>95</sup> That Act provides that the National Park Service:

shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.<sup>96</sup>

When the Sierra Club challenged National Park Service failures to mitigate the potential harm of logging activity adjacent to Redwood National Park, the federal district court for the Northern District of California held that the National Park Service Organic Act imposed public trust duties on the National Park Service, by requiring that park resources remain “unimpaired for the enjoyment of future generations.”<sup>97</sup> Essentially, the statute’s concern for posterity led the court to find “a general trust duty imposed upon the National Park Service . . . to conserve scenery and natural and historic objects and wildlife,” despite the absence of any specific statutory reference to the public trust doctrine.<sup>98</sup> This statutory trust duty, reasoned the court, obligated the Secretary of the Interior to take reasonable steps to protect Redwood National Park from the effects of logging by upland property owners.<sup>99</sup> Although the threats to the park were largely external, and the actions necessary to ensure adequate protection of park resources required additional funding, the court ordered the Secretary of the Interior to exhaust all possibilities of negotiating favorable agreements with upland property owners, and to

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93. 16 U.S.C. § 1851(a)(1) (2012).

94. *Id.* § 1851(a)(8).

95. 16 U.S.C. § 1 (2012).

96. *Id.*

97. *Sierra Club v. Dep't of Interior*, 398 F. Supp. 284, 287 (N.D. Cal. 1975) (subsequent history omitted) [hereinafter *Redwood National Park case*].

98. *Id.*

99. *Id.* at 288.

request funds from Congress, if necessary.<sup>100</sup> The recognition of the public trust doctrine was thus the recognition of an obligation beyond the plain language of a statute, as the court determined that the Secretary had an affirmative duty to protect the public trust and ensure that resources would be left “unimpaired for the enjoyment of future generations.”<sup>101</sup>

The Redwood National Park case indicates that a court can interpret congressional intent to impose trust principles even in the absence of specific statutory references to the public trust doctrine, because statutory management regimes complement the public trust doctrine rather than replace it.<sup>102</sup> It follows that the trust language in the MSA— requiring resources to remain available for use by future generations, much like the National Park Service Organic Act— creates public trust duties in the management of the EEZ.<sup>103</sup> There may not be an explicit reference to the public trust doctrine in the MSA, but there is an implicit endorsement, as the national standards clearly require fishery management councils to achieve optimum yield “on a continuing basis.”<sup>104</sup> This statutory mandate indicates that a fishery cannot be exploited in a manner which would deny posterity access to the resource, just as the National Park Service must ensure that future generations have unimpaired access to the resources in Redwood National Park.

In addition to requiring the sustained viability of commercial fisheries, the MSA also includes provisions aimed at preserving the long-term health of the ecosystems that support those fisheries. For example, the MSA’s definition of “conservation and management” stresses the need to avoid “irreversible or long-term adverse effects on fishery resources and

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100. *Id.* at 294.

101. *Id.*

102. See Klass, *supra* note 66, at 728 (“as the modern common law public trust doctrine has developed . . . courts can now rely on that body of law to inform their interpretations of state constitutional law and statutory law.”).

103. 16 U.S.C. § 1851(a)(1), (8) (2012).

104. *Id.* § 1851(a)(1). See also *N. Carolina Fisheries Ass’n, Inc. v. Daley*, 16 F. Supp. 2d 647, 655 (E.D. Va. 1997) (“optimum yield is measured on a continuing basis, therefore ‘management measures must aim to achieve, on a continuing basis, the optimum yield from each fishery, not the optimum yield in a single year.’” (quoting *J.H. Miles & Co. v. Brown*, 910 F. Supp. 1138 (E.D. Va. 1995))). See also 50 C.F.R. § 602.11(d)(1) (1995) (optimum yield is based on maximum sustainable yield, which is defined as the “largest average annual catch or yield that can be taken over a significant period of time from each stock under prevailing ecological and environmental conditions.”). NMFS has stated that Alaska’s fishery management strategy, formulated according to the state’s public trust doctrine, is consistent with the MSA, implying that the MSA and the public trust doctrine are not inconsistent. Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Salmon, 77 Fed. Reg. 75570 (Dec. 21, 2012) (to be codified at 50 C.F.R. pt. 679) [hereinafter *Pacific Salmon*] (“as codified in the Alaska constitution, laws, regulation, and policies, [Alaska’s fishery management strategy] is consistent with the Magnuson-Stevens Act’s national standards.”).

the marine environment.”<sup>105</sup> Relying on a similarly forward-looking statutory provision, the federal district court for Northern District of California imposed statutory trust duties on the Secretary of the Interior, even though doing so required the Secretary to seek additional funding from Congress and enter into negotiations with private parties.<sup>106</sup> In contrast, if a court were to impose trust duties on a fishery management council, the council could fulfill those obligations by merely amending its own FMPs to provide better protection of fishery resources for future generations. Because this remedy would be far less burdensome than negotiating with private landowners or petitioning Congress for funding—as required in the Redwood National Park case—courts should not be reluctant to enforce the MSA’s public trust obligations.

There are two important implications to the assertion that the MSA’s national standards create public trust duties. First, the trust duties imposed by the statute provide NMFS with a justification for rejecting NPFMC management measures that fail to protect the future health of the overall marine environment. FMPs are largely developed by the fishery management councils, and NMFS does not have the authority to institute whatever management policies it would like.<sup>107</sup> But, the agency could encourage the NPFMC to reconsider the implications of the MSA’s national standards by requiring management strategies to involve forward-looking public trust considerations. Further, although the NPFMC is largely comprised of industry representatives, and it is likely that the majority of council members may be uninterested in management decisions with no immediate economic benefits,<sup>108</sup> the public trust doctrine provides any interested council member with a legitimate basis for raising concerns over the long-term sustainability of current management practices. Second, environmental plaintiffs or states concerned with federal management of the EEZ can challenge fishery management decisions by alleging a violation of the public trust doctrine if, for example, a stock is overfished and the future viability of a fishery is uncertain. Currently, fishery management decisions are challenged under the APA, and courts are inclined to defer to agency decisions so long as

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105. 16 U.S.C.A. § 1802(5). *See also* PEW CHARITABLE TRUSTS, *supra* note 83, at 36 (arguing that the definition of “conservation and management” provides fishery managers with the authority to employ an ecosystem-based management approach).

106. *Sierra Club v. Dep’t of Interior*, 398 F. Supp. 284, 294 (N.D. Cal. 1975).

107. Bonnie McCay et al., *You Win Some, You Lose Some: The Costs and Benefits of Litigation in Fishery Management*, 7 OCEAN & COASTAL L.J. 5, 24 (2001) (“NMFS cannot just do whatever they want to do. They have to work through third parties, the fishery management councils.”).

108. *See, e.g., Van Tuyn, supra* note 31.

they are reasonable.<sup>109</sup> Alternatively, if a plaintiff brought a claim alleging damage to the public trust—as did the Sierra Club in the Redwood National Park case—a court would not have to accord agency actions the same degree of deference.<sup>110</sup> As Professor Lum has stated, this is “because breach of trust claims do not require the courts to defer to agency decisions, as would be the norm in an administrative procedure act appeal,” so courts are “less constrained to adopt the agency’s point of view.”<sup>111</sup> By curtailing deference to NMFS, the public trust doctrine might provide a new, independent means of challenging fishing activity that negatively impacts the future health of marine ecosystems—a more efficient alternative to current challenges being made on a species by species basis and only in response to federal agency actions.

#### V. THE ALASKAN PUBLIC TRUST DOCTRINE IN THE EEZ

The MSA allows fishery management councils to delegate management authority to the states in certain situations, as discussed further below.<sup>112</sup> When a council chooses to delegate authority to a state that manages fisheries subject to the public trust doctrine, as in the case of Alaska, the doctrine necessarily applies to EEZ fishery management, regardless of whether there is a federal public trust. This section examines the authority of fishery management councils to delegate or defer fishery management to a state, and then considers three EEZ fisheries in which the NPFMC has delegated or deferred management authority to the State of Alaska: Tanner crab, rockfish, and salmon. In each of these fisheries, the State of Alaska has considerable discretion in its management decisions, so long as it does not take actions inconsistent with federal regulations.<sup>113</sup> Often, the areas under state management are subject to stricter regulation than those under federal control,<sup>114</sup> a fact at least

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109. Turnipseed et al., *supra* note 14, at 57. See also McCay et al., *supra* note 107, at 24 (“Magnuson-Stevens Act is set up in a way that is very difficult to attack. The amount of discretion that is vested in the agency is enormous.”).

110. Arnold L. Lum, *How Goes the Public Trust Doctrine: Is the Common Law Shaping Environmental Policy?*, 18 NAT. RESOURCES & ENV’T 73, 74-75 (2003).

111. *Id.* at 75.

112. See *infra* Part V.A.

113. NPFMC, FISHERY MANAGEMENT PLAN FOR BERING SEA/ALEUTIAN ISLANDS KING AND TANNER CRABS 7 (2011) [hereinafter Crab FMP], available at <http://www.npfmc.org/wp-content/PDFdocuments/fmp/CrabFMPOct11.pdf>. The fisheries in the EEZ off Alaska are also subject to international treaty agreements in some instances. See Salmon FMP, *supra* note 24, at ii. Whether Alaska’s public trust doctrine applies in a fishery subject to a treaty is an open question beyond the scope of this article.

114. NPFMC, FISHERY MANAGEMENT PLAN FOR GROUND FISH OF THE GULF OF ALASKA 55 (2013) [hereinafter Rockfish FMP], available at <http://www.npfmc.org/wp-content/PDFdocuments>

partially attributable to Alaska's public trust doctrine, which requires a greater focus on the long-term health of fisheries than does the MSA.<sup>115</sup> NMFS has already indicated that Alaska's management strategy is consistent with the MSA, including the state's constitutional obligation to act as trustee over fishery resources,<sup>116</sup> so nothing in the MSA restricts the NPFMC from adopting the same trust principles as the State of Alaska. The NPFMC should therefore incorporate trust principles into the management of other fisheries under its jurisdiction to maintain a consistent management approach throughout the region.<sup>117</sup>

### A. *The Delegation of Fishery Management Authority to States*

Although the MSA states that the U.S. has "exclusive fishery management authority over all fish . . . within the [EEZ],"<sup>118</sup> the statute also describes two situations in which a state can regulate fishing vessels in the EEZ: (1) if the fishing vessel is registered under the law of that state, and there is either no FMP in place for the relevant fishery or the state's regulations are consistent with the FMP; or (2) if the FMP for the fishery in which a vessel is operating delegates management authority to a state.<sup>119</sup> NMFS contends that these two provisions allow fishery management councils to either defer or delegate management authority to a state when a council deems such action appropriate.<sup>120</sup> In a recent challenge to that interpretation of the MSA, the United Cook Inlet Drift Association

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/fmp/GOA/GOAfm613.pdf ("Such State regulations are in addition to and stricter than Federal regulations").

115. Compare ALASKA CONST. art. VIII § 4 ("Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State *shall* be utilized, developed, and maintained on the sustained yield principle) with 16 U.S.C. 1851(a)(1) ("Conservation and management measures *shall* prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery"). The state focus on sustained yield *principles*, as opposed to a mandate that fisheries achieve optimum yield each year, provides a more flexible means of effectuating in-season closures and considering long-term effects of fishing. See *Native Vill. of Elim v. State*, 990 P.2d 1, 8 (Alaska 1999) (In applying the "sustained yield" clause, the Alaska Board of Fisheries "adopted a number of concrete measures designed to sustain the salmon runs when evidence indicated that they were in decline: closing and/or severely restricting the commercial, sport, and subsistence fisheries; modifying the fishing season; and imposing chum caps, a permit system, and restrictive gear requirements.").

116. *Pacific Salmon*, *supra* note 104, at 75575 ("current management, as codified in the Alaska constitution, laws, regulations, and policies, is consistent with the Magnuson-Stevens Act's national standards.").

117. This may even be mandated by national standard 3, which provides that "[t]o the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination." 16 U.S.C. § 1851(a)(3) (2012).

118. *Id.* § 1811(a).

119. *Id.* § 1856(a)(3)(A)–(B).

120. *United Cook Inlet Drift Ass'n v. National Marine Fisheries Service (UCIDA)*, 3:13-cv-00104-TMB, 17 (D. Alaska 2014) (on file with author).

(UCIDA), a group of commercial fishermen, claimed that NMFS improperly removed three salmon fisheries from the applicable FMP, thereby deferring management to the State of Alaska.<sup>121</sup> The federal district court for the District of Alaska upheld the NMFS decision as a reasonable interpretation of the MSA, noting that the statute clearly contemplated state regulation in the absence of a federal management plan.<sup>122</sup>

The UCIDA court, the first to consider state management in the EEZ, indicated that not every fishery requires federal management throughout the EEZ. The court stated that the MSA “sought to ensure that states maintained an active role in fisheries management.”<sup>123</sup> Delegating or deferring management authority to the states for a migratory species can, according to the court, give effect to national standard 3, which requires stocks to be managed as a unit throughout their range to the extent practicable.<sup>124</sup> Because the authority of the fishery management councils to defer management to the states by revoking an FMP (as opposed to specifically delegating authority in an FMP) is ambiguous, NMFS’s interpretation of the MSA on this issue was, according to the court, entitled to deference.<sup>125</sup> The implications of NMFS’s ability to defer or delegate management authority to the State of Alaska are explored below.<sup>126</sup> However, it is clear that even if there is no federal public trust doctrine in the EEZ—which is far from certain—<sup>127</sup> when the fragmented nature of the MSA creates state-regulated pockets in the EEZ, managing states will apply their public trust principles to the EEZ. The regionalized fishery management system can therefore produce conservation benefits under the right circumstances as, where it applies, the public trust doctrine requires state fishery managers to consider the long-term impacts of fishery management decisions on entire marine ecosystems, rather than focusing on a single target species in each management plan.<sup>128</sup>

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121. *Id.* at 7.

122. *Id.* at 20.

123. *Id.* at 19.

124. 16 U.S.C. § 1851(a)(3) (2012).

125. *UCIDA v. NMFS*, at 28. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute”).

126. *See infra* Part V.B.

127. *See supra* Part IV (discussing the trust duties Congress imposed through the MSA’s national standards).

128. *See, e.g.*, Kathryn J. Mengerink, *The Pew Oceans Commission Report: Navigating A Route to Sustainable Seas*, 31 *ECOLOGY L.Q.* 689, 699 (2004) (explaining “fishery management plans are criticized because they manage single species rather than ecosystems. Problems attributed to single-

### B. EEZ Fisheries Managed by Alaska

Alaska currently has management authority over several EEZ fisheries, and thus the state's public trust doctrine is already relevant to fishery management in portions of the EEZ. In 1987, NMFS repealed the FMP for the Tanner crab fishery in the Gulf of Alaska because the FMP failed to coordinate federal management efforts with the State of Alaska.<sup>129</sup> NMFS determined that the FMP had not provided adequate flexibility in managing the crab fishery, as the plan did not allow the federal government to make in-season adjustments—such as adopting state harvest guidelines or recommended closures—that were at times necessary to ensure the conservation and protection of the stock.<sup>130</sup> There is currently no FMP for the Tanner crab fishery in the Gulf of Alaska, so management is deferred to the State of Alaska with no federal involvement.<sup>131</sup> Alaska's constitutional public trust obligations therefore play a huge role in ensuring the continued stability of one of the most commercially important fisheries in the region. Further, when NMFS developed a new FMP for crab in the Bering Sea, approved in 1989, it sought to avoid the inflexibility of the previous FMP by delegating certain management measures to the State of Alaska, though, in this case, subject to federal oversight.<sup>132</sup> The primary objective of the current Bering Sea Tanner crab FMP is to “[e]nsure the long-term reproductive viability of king and Tanner crab populations.”<sup>133</sup> This goal is consistent with Alaska's public trust doctrine because it emphasizes the importance of maintaining the health of the fishery for future generations. When the crab FMP is considered in context—as part of a plan delegating management authority to a state with strong public trust traditions—it likely represents the first instance of a federal action creating public trust obligations in the EEZ,

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species management include lack of consideration of significant ecosystem effects of commercial fishing such as habitat destruction and bycatch.”).

129. Tanner Crab off Alaska, 52 Fed. Reg. 17577, 17578 (May 11, 1987) (to be codified at 50 C.F.R. pt. 671); 16 U.S.C. § 1851(a)(3) (2012) (the FMP's failure to coordinate management with the state was a violation of national standard 3, which requires stocks to be managed as a unit throughout their range to the extent practicable).

130. *Id.*

131. See, *Species, Tanner Crab Management*, ALASKA DEP'T OF FISH AND GAME, <http://www.adfg.alaska.gov/index.cfm?adfg=tannercrab.management> (last visited Spring 2015) (“The Alaska State Constitution establishes, as state policy, the development and use of replenishable resources, in accordance with the principle of sustained yield, for the maximum benefit of the people of the state.”).

132. Crab FMP, *supra* note 113, at 7.

133. *Id.* at 1.



because Alaska is still bound by its constitutionally-mandated public trust duties even when acting with delegated authority from NMFS.<sup>134</sup>

In an action similar to the repeal of the crab FMP, in 1998, NMFS removed black and blue rockfish from the FMP for groundfish in the Gulf of Alaska.<sup>135</sup> The purpose of this action was to prevent localized overfishing by allowing the state to implement harvest guidelines based on smaller geographic areas— a measure that was not possible under federal regulations.<sup>136</sup> Federal management had relied on sampling data from a pelagic trawl fishery and set high overall catch limits for rockfish, creating essentially unrestricted harvests of nearshore rockfish.<sup>137</sup> By allowing the state to set catch limits based on its own sampling data, NMFS's final rule noted that removing the two species of rockfish from the FMP "should result in more effective conservation measures in both nearshore and offshore areas."<sup>138</sup> In addition, an environmental assessment concluded that, even though the fisheries might undergo short-term restrictions, the "[l]ong term economic effects . . . should be beneficial as stocks of black rockfish would be sustained under more direct management."<sup>139</sup> All of these findings are consistent with the notion that state management, pursuant to Alaska's public trust doctrine, will necessarily involve planning for the long-term conservation of a species to ensure continued public access to the fishery.

NMFS has also delegated Alaska the authority to regulate state-registered vessels fishing in the eastern section of the demersal shelf rockfish fishery,<sup>140</sup> allowing for increased coordination between state and federal management of the species.<sup>141</sup> NMFS's coordination with Alaska

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134. *Id.* at 2 (under the FMP, minimum sizes, catch limits, in-season adjustments, and closed waters are all adopted under state laws, subject to an appeals process in the FMP, so Alaska will promulgate many important regulations pursuant to state law and these management decisions will all be burdened by the state public trust doctrine); *see also* Tanner Crab off Alaska, *supra* note 129 (NMFS has recognized that the state's management policies provide the flexibility to effectuate in-season fishery closures due to the state's emphasis on maintaining fishery productivity for future generations, consistent with Alaska's public trust duties).

135. Management Authority for Black and Blue Rockfish, 63 Fed. Reg. 11167 (March 6, 1998) (to be codified at 50 C.F.R. pt. 679).

136. *Id.*

137. NPFMC, ENVIRONMENTAL ASSESSMENT OF AMENDMENT 46 TO THE FISHERY MANAGEMENT PLAN FOR GROUND FISH OF THE GULF OF ALASKA 2 (Jan. 1998), *available at* [http://alaskafisheries.noaa.gov/analyses/groundfish/EA\\_Amendment\\_46\\_GOA\\_Jan\\_1997.pdf](http://alaskafisheries.noaa.gov/analyses/groundfish/EA_Amendment_46_GOA_Jan_1997.pdf).

138. Management Authority for Black and Blue Rockfish, *supra* note 135, at 11168.

139. ENVIRONMENTAL ASSESSMENT OF AMENDMENT 46, *supra* note 130, at 20.

140. Rockfish FMP, *supra* note 114, at 55.

141. *Id.* at 57 ("the Regional Administrator must coordinate inseason adjustments, when appropriate, with the State of Alaska to assure uniformity of management in both State and Federal waters.").

will necessarily involve public trust considerations, as trust principles are inherent to any state management strategy. That is, because the Alaskan public trust doctrine finds authority in the Alaska Constitution and clearly applies to the management of fishery resources,<sup>142</sup> regardless of whether such management is in coordination with the federal government, state fishery managers must provide for the sustained yield of fisheries and consider the effects of fishing on future generations.<sup>143</sup>

Most recently, NMFS amended the FMP for salmon fisheries in the EEZ off Alaska to remove three historical net fisheries from the western area of the Gulf of Alaska, thereby entirely deferring management of those fisheries to the state.<sup>144</sup> The amendment also reaffirmed Alaska's management authority over the entire eastern area of the Gulf.<sup>145</sup> This amendment led to the litigation discussed above, in which the United Cook Inlet Drift Association unsuccessfully challenged NMFS's authority to defer management to the State of Alaska.<sup>146</sup> Under the current FMP, all commercial salmon fishing in the western Gulf of Alaska is now managed by the State of Alaska, with the federal government retaining management authority only over areas closed to commercial fishing.<sup>147</sup> NMFS determined that the State of Alaska's escapement-based system of salmon management—which monitors the estimated size of spawning stock in key rivers, streams, or watersheds, and allows for in-season adjustments to harvest limits—was superior to the MSA's rigid annual catch limits.<sup>148</sup> Escapement-based management is more effective at preventing overfishing of salmon than the pre-season predictions of sustainable catch limits used in most FMPs, because the state management program is conducted in real time and provides fishery managers with in-season

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142. ALASKA CONST., art VIII § 3 (“Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for their common use.”); *Gilbert v. State, Dep’t of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 398-99 (Alaska 1990) (“The state has an obligation to manage fish and game resources to the benefit of all in accord with its public trust duties.”).

143. ALASKA CONST., art VIII § 4 (“Fish . . . and all other replenishable resources belonging to the state *shall* be utilized, developed, and maintained on the sustained yield principle.”) (emphasis added).

144. *Pacific Salmon*, *supra* note 104.

145. *Id.*

146. *United Cook Inlet Drift Ass’n v. National Marine Fisheries Service*, No. 3:13-cv-00104-TMB (D. Alaska filed Sept. 5, 2014).

147. *See Salmon FMP*, *supra* note 24, at 9 (the rest of the west area was closed to net fishing by the *International Convention for the High Seas Fisheries of the North Pacific Ocean*, so presumably federal authority to regulate salmon fishing in this part of the EEZ would only be relevant in the event that the international convention is amended or repealed).

148. NMFS, AMENDMENT 12: REVISIONS TO THE FISHERY MANAGEMENT PLAN FOR THE SALMON FISHERIES IN THE EEZ OFF THE COAST OF ALASKA 55 (2012), *available at* <http://www.alaskafisheries.noaa.gov/sustainablefisheries/amds/default.htm>.

assessments of run strength.<sup>149</sup> If salmon runs are lower than expected, fishery managers can make in-season closures and ensure that minimum escapement goals are met in order to “maximize surplus productivity of future runs.”<sup>150</sup> As expected, the state management strategy is willing to sacrifice short-term economic benefits to provide for the sustained vitality of the fishery—a management philosophy consistent with the public trust doctrine’s emphasis on preserving resources so that they might be enjoyed by future generations. This public trust objective, grounded in state law,<sup>151</sup> allows state fishery managers to think beyond the current fishing season, and stands in contrast to the goals of the NPFMC, which is dominated by industry representatives and is thus generally concerned with immediate economic benefits.<sup>152</sup>

Further, NMFS made a determination that the state’s management strategy “as codified in the Alaska constitution, laws, regulation, and policies, is consistent with the Magnuson-Stevens Act’s national standards.”<sup>153</sup> This statement is arguably the first time NMFS has acknowledged that Alaska’s laws, including its constitutional provisions concerning the state’s public trust doctrine, are consistent with federal fishery management laws. Such an assertion indicates that the NPFMC should consider trust principles even in federally managed EEZ fisheries, as the MSA is not inconsistent with the Alaskan public trust doctrine. The NPFMC should be especially willing to consider trust principles when it is necessary to coordinate management efforts with the State of Alaska regarding migratory species, as such considerations would encourage management strategies that focus less on a single fishing season and more on the need to conserve marine resources, including non-target species, to ensure that fisheries remain productive for years to come.

### *C. Expansion of the Public Trust to Other Fisheries*

In each of the examples discussed above, NMFS either repealed an FMP or removed a species from an FMP in order to allow the State of Alaska to take a more direct management role in a fishery. Each NMFS decision was marked by agency assertions that the FMP amendment would result in conservation benefits to the affected species, implicitly

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149. Salmon FMP, *supra* note 24, at 26.

150. *Id.*

151. See ALASKA CONST., art VIII §§ 3, 4.

152. See Van Tuyn, *supra* note 31, at 666 (discussing “the unique decision-making structure of fishery management in the United States—where industry-dominated ‘regional fishery management councils’ are empowered to craft regulations for their own industry.”).

153. Pacific Salmon, *supra* note 104, at 75575.

acknowledging the emphasis on sustainability that characterizes Alaska's fishery management laws.<sup>154</sup> Further, NMFS seems to recognize the importance of coordinating fishery management with the State of Alaska, a goal that is consistent with national standard 3,<sup>155</sup> and which elevates the importance of Alaska's fishery management policies by providing the state with more autonomy over EEZ fishery management. It seems likely that anytime a migratory species is at risk of being overfished, and the species is important to both the State of Alaska and the federal government, the NPFMC will work to accommodate any differences in fishery management policies by coordinating management with the state, as evidenced by the examples of Tanner crab, rockfish, and salmon in the EEZ off Alaska. The public trust doctrine will thus continue to be relevant with regard to migratory species of fish, even if the NPFMC does not adopt public trust principles in other FMPs. The State of Alaska's management objectives reflect a public trust concern for future generations, and this concern will have to factor into any federal efforts to coordinate management with the state. Incorporating Alaska's public trust doctrine into the management of migratory species also provides environmental plaintiffs with an important means of challenging fishery management decisions. If FMPs include public trust obligations, then a plaintiff can allege damage to the trust corpus whenever a fishing regulation jeopardizes the future of the fishery, even if that regulation might be reasonable under the MSA.

## VI. CONCLUSION

The public trust doctrine is adrift in federal waters, waiting to be employed. It has already been incorporated into the management of EEZ fisheries in which the NPFMC has delegated or deferred management authority to the State of Alaska, because the state's fishery management policy is always burdened by the public trust doctrine.<sup>156</sup> There is no longer any doubt that the public trust doctrine is consistent with the MSA and federal management of the EEZ, as NMFS concluded that Alaska's fishery management strategies, which reflect broad public trust concerns, are consistent with all applicable federal laws.<sup>157</sup> Further, state management

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154. See Salmon FMP, *supra* note 24; Rockfish FMP, *supra* note 114; Crab FMP, *supra* note 113.

155. 16 U.S.C.A. § 1851(a)(3) (2012) (National standard 3 provides that "[t]o the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.").

156. See *supra* Part V.B.

157. *Id.*

of certain EEZ fisheries subject to the state's public trust principles is only possible in a regionalized fishery management system. Therefore, even in the absence of recognized federal public trust duties in the EEZ, deferring management of highly migratory stocks to the states provides a means of injecting the public trust doctrine into EEZ fishery management.<sup>158</sup>

However, the NPFMC and environmental plaintiffs should work to incorporate public trust principles into all federally managed fisheries for two reasons. First, in order to prevent inconsistent management of migratory stocks under NPFMC jurisdiction, as required by national standard 3,<sup>159</sup> the public trust doctrine should apply to all fisheries in the EEZ that are important to both the federal government and the State of Alaska. Second, the MSA contains trust principles in its national standards,<sup>160</sup> and fishery managers and environmental plaintiffs should be willing to invoke the public trust doctrine to encourage or defend management strategies that promote conservation of the entire marine ecosystem. If management efforts continue to focus on harvesting commercially valuable fish, the habitat essential to the survival of those fish, as well as living marine resources with less commercial value, will remain largely unregulated and thus unprotected.<sup>161</sup> The destruction of these marine resources might deprive future generations of their usufructuary right of fishery, in violation of both the public trust doctrine and the MSA. The MSA requires that fishery management measures produce optimum yields "on a continuing basis,"<sup>162</sup> reflecting a public trust concern for posterity, and sustained production requires a healthy ocean to support commercially viable fish populations.<sup>163</sup> The public trust doctrine provides fishery managers with a means of correcting management oversights within the framework of existing regulations, and allows environmental plaintiffs to challenge commercial fishing activity that threatens the long-term health of fisheries in a manner inconsistent

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158. *See supra* Part V.A.

159. 16 U.S.C. § 1851(a)(3) (2012).

160. *See supra* Part IV.B.

161. *See* 16 U.S.C. 1853(a)(7) (2011) (although the MSA supposedly requires FMPs to designate "essential fish habitat" and "minimize to the extent practicable adverse effects on such habitat caused by fishing," this provision has not led to much actual habitat protection); *See* Van Tuyn, *supra* note 29, at 670 ("In the North Pacific, NMFS focused almost exclusively on the designation and description of EFH, while deferring detailed consideration of the impacts of fishing on habitat—as well as measures to mitigate those impacts—until some undetermined second stage . . .").

162. 16 U.S.C. 1851(a)(1) (2012).

163. *See* Johnson, *supra* note 26 ("Regardless of where the right of fishery is recognized, it is meaningless unless fish are there to be caught. If the water is polluted, the fish die. Thus the right of fishery necessarily includes an implied right to water quality sufficient to support the fishery.").

with the MSA's national standards. All that is left is for the relevant actors in fishery management to seize and apply the doctrine.